

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today
(1) was not written for publication in a law journal and
(2) is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte FRANK C. GOODMAN,
ROBERT T. SEELEY AND
ROBERT J. DEMPSEY

Appeal No. 96-4102
Application 08/500,421¹

ON BRIEF

Before ABRAMS, PATE, and McQUADE, **Administrative Patent Judges**.
PATE, **Administrative Patent Judge**.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 4 and 5
and the examiner's refusal to allow claim 6, amended after final
rejection. Claims 4, 5, and 6 are the only claims remaining in
the application.

¹ Application for patent filed July 10, 1995.

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The claimed invention is directed to a tear-open container formed of tear-resistant material. The ends of the container have heat-sealed joints with at least one heat-sealed joint having an elongated tear-propagating slit formed therein.

Claim 4, reproduced below is further illustrative of the claimed subject matter.

4. A tear-open bag for containing a flowable material, said bag being formed with a non-tearable heat-sealable synthetic resin, said bag comprising opposite end portions at least one of which is closed by means of an expanded planer [sic, planar] heat seal joint, said bag being formed with angled corners at opposite sides of said heat seal joint, and an elongated tear-propagating slit extending through said heat seal joint and not extending to the edges of the bag, said slit being wholly contained within said heat seal joint, and said slit being oriented relative to one of said corners so as to be operable, when manually stressed, to propagate a tear line in the bag which is oblique relative to said one corner so that said one corner can be manually torn away from the remainder of the bag and thereby form a pouring spout in the bag.²

The reference cited by the examiner as evidence of anticipation and obviousness is:

Arcudi	3,809,220	May 7, 1974
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The following rejections are on appeal:

Claim 4 has been rejected under 35 U.S.C. 102(b) as being clearly anticipated by Arcudi.

² We have interpreted the claim expression "non-tearable" found in line 2 of claim 4 on appeal as directed to a tear-resistant material.

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Claims 5 and 6 have been rejected under 35 U.S.C. § 103 as unpatentable over Arcudi.

The appellants have stated that the claims are separately argued and do not stand or fall together and have provided arguments directed to the patentability of each claim on appeal. Therefore, the claims on appeal do not stand or fall together.

OPINION

Rather than reiterate the arguments of the appellants and the examiner, reference is made to the appropriate sections of the appeal brief and the examiner's answer for the full details thereof.

We have carefully reviewed the rejections on appeal in light of the arguments of the appellants and the examiner. As a result of this review, it is our determination that the Arcudi reference clearly anticipates the subject matter of claim 4 on appeal. Therefore, the rejection of this claim will be sustained. On the other hand, Arcudi does not provide evidence that the claimed subject matter of claims 5 and 6 would have been **prima facie** obvious to one of ordinary skill at the time the invention was made. Therefore, the rejection of claims 5 and 6 is not sustained. Our reasons follow.

It is the examiner's finding of fact, and we concur, that Figure 10 of Arcudi shows a tear-openable package 80. The package 80 can contain a flowable material such as a powder. See column 5, line 12. The package is formed of a tear-resistant material (column 1, line 53) of heat-sealable synthetic resin formed from two sheets of plastic film heat-sealed around the edge 83 for forming the compartment 84 to house the material or drug to be dispensed. See column 4, lines 49 ff. As shown in Figure 10, the package or container 80 has four right angle corners. A slit 17 is cut through the plastic film at an oblique angle to one of the corners, as depicted in Figure 14, so that the lower right-hand corner of Figure 10 may be manually torn away from the remainder of the package thereby forming a pouring opening in the container by which any powder therein might be removed. As stated above, we concur in the examiner's findings of fact and with the examiner's ultimate finding that Arcudi clearly anticipates the subject matter of claim 4.

Appellants argue, on page 7 of the brief, that Arcudi is not a bag. Appellants continue the argument by relating how the present specification discloses how appellants make a bag from a tube-like web of tear-resistant synthetic resin. We are in

agreement with the examiner that it is the claims that define the invention rather than the unclaimed description from appellants' specification.

Appellants also argue that Arcudi does not teach an elongated tear-propagating slit that does not extend to the edge of the bag. Here again, we agree with the examiner that Figures 10 and 11 clearly show the slit 17 of Arcudi not extending to the edge of the container or package. We note that if a user of appellants' package folded the heat-sealed seam through the slit, then the slit could be said to extend to the edge of the package just as Arcudi's does. Appellants further argue that Arcudi does not tear off a corner. We disagree. If the container or package of Figure 10 is torn open as specified by Arcudi, the lower right hand corner, as shown in Figure 10, is torn off. Finally, we are in agreement with the examiner that to the extent the appellants' package forms a pouring spout, Arcudi's does also.

Turning to the rejection of claims 5 and 6 under 35 U.S.C. § 103, we are of the view that the Arcudi reference does not provide evidence sufficient to have rendered the subject matter prima facie obvious to one of ordinary skill in the art. The Arcudi reference is not concerned with chlorine-stable synthetic resins and indeed does not disclose such. While the examiner has

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stated that it would have been obvious as within the general skill of the worker to select a known material on the basis of its suitability for the intended use, the examiner has not shown that the chlorine-stable synthetic resin is indeed well known for the intended use claimed by appellants. The examiner has simply provided no evidence with respect to chlorine-stable synthetic resin in a tear-openable container for flowable materials. Therefore, the rejection of claims 5 and 6 is reversed.

SUMMARY

The rejection of claim 4 under 35 U.S.C. § 102 has been affirmed. The rejection of claims 5 and 6 under 35 U.S.C. § 103 has been reversed. The examiner's rejections are affirmed-in-part.

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No time period for taking any subsequent action in
connection with this appeal may be extended under 37 CFR
§ 1.136(a).

AFFIRMED-IN-PART

NEAL E. ABRAMS)	
Administrative Patent Judge)	
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WILLIAM F. PATE, III)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
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)	
JOHN P. McQUADE)	
Administrative Patent Judge)	

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William A. Simons
Wiggin & Dana
One Century Tower
New Haven, CT 06508-1832

WFP/cam